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THE HOMESTEAD EXEMPTION.

(CONCLUDED.)

III.—HOMESTEAD RIGHT—HOW PARTED WITH OR LOST.—The homestead right may be parted with or lost:—

1. *By a Voluntary Sale and Conveyance, duly executed.*
2. *By Judicial Sale under a Mortgage, duly executed.*
3. *By total and absolute Abandonment.*

We will first consider Voluntary Sales and Conveyances.—This subject is regulated by the statutes of the various states. These prescribe the requisites and formalities necessary to make a valid alienation. In order to protect the wife and family, the statutes provide that unless she joins with her husband, any conveyance which he may make will be ineffectual to cut off or affect the homestead right. In some instances any conveyance in which she does not join is declared to be of *no validity* whatever; in others it is declared that such conveyance shall not affect her right or that of the family. To the difference in the special phraseology of the various statutes is to be ascribed much of the apparent conflict in the decisions on this subject.

The homestead right of the family is peculiarly favored by the courts. And hence it may be laid down as a general rule that, to make an operative conveyance of the homestead, or an effectual release or waiver of the homestead exemption, "the mode pointed out by the statute must be strictly pursued." *Poole* vs. *Gerrard*, 6 Cal. 73; *Vanzant* vs. *Vanzant*, 23 Ill. 536.

Under a statute which provides that a "conveyance of a homestead by the owner is of no validity, unless the husband and wife (if the owner is married) concur in and sign such conveyance," and that it may "be sold on execution for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that the homestead is liable therefor," it was held, that a conveyance or mortgage signed by the husband and wife, describing the property by metes and bounds, is sufficient without the fact being *expressly stated that premises were the homestead*. *Babcock* vs. *Hoey*, 11 Iowa 375 (LOWE, C. J., *dissentiente*).

So under a statute which provides "that no sale or alienation of the homestead shall be valid without the signature of the wife to the same, acknowledged," &c., it was holden not to be necessary to the validity of a mortgage that it should recite or state that the premises were the homestead of the grantors. They are presumed to know what they are granting.[1] *Pfeiffer* vs. *Reihn*, 13 Cal. 643.

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[1] In *Poole* vs. *Gerrard*, 6 Cal. 71, it was held, under the above statute, that a homestead could only be conveyed by the joint deed of the husband and wife, and that the separate deeds of each were both invalid. S. P. *Dorsey* vs. *McFarland*, 7 Cal. 342; 8 Id. 75. See also *Howe* vs. *Adams*, 28 Verm. 544.

The statute of Illinois provides that "no release or waiver of the homestead exemption shall be valid, unless the same shall be in writing, subscribed by such householder and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate," &c. It was held, that a formal release or waiver of the statute must be executed, and that, to make an effectual grant, the wife must do something more than release her dower. *Kitchell* vs. *Burgwin*, 21 Ill. 40. Explained in 23 Id. 536. The usual form of acknowledgment will bind the husband; but that of the wife must show that the officer taking it fully informed her of her rights under the act, and that she voluntarily released or waived them. *Vanzant* vs. *Vanzant*, 23 Ill. 536. See further 26 Ill. 107, 150.

In New Hampshire, under a statute limiting the value of the homestead to $500, and providing that no release or waiver shall be valid unless executed by both hus-

In those states where the conveyance of the husband without the signature of the wife is of *no validity*, an executory contract or bond of the husband to convey the homestead will not be specifically enforced. It is doubtful whether such a contract would be specifically executed, against the wife's objection, in any of the states where homestead laws exist. *Brurer* vs. *Wall*, 23 Texas 585; *Yost* vs. *Devault*, 9 Iowa 60; S. C., 3 Iowa 345. But a *subsequent adoption* of the premises as a homestead is no answer to a bill for specific performance. *Yost* vs. *Devault*, 3 Iowa 345. The husband alone may defeat such a decree by showing the premises to be the homestead; he is not bound to show that the wife refused to join in the conveyance.

Specific execution might, perhaps, be decreed, if from the acquisition of another home, or from other causes, the premises have ceased to be a homestead. 23 Texas 585.

A contract on the part of the husband to convey the homestead is not void,[1] and damages may be recovered against him for its breach.[2] 23 Texas 585, *supra;* 9 Iowa 60, *supra.* But a contract to compel his wife to convey would be an unlawful contract. Ibid.

SECOND: *As to Alienation of Homestead by way of Mortgage.*— Much of what is above said in relation to sales and absolute conveyances is equally applicable here, and need not be repeated.

Under a statute which provides that a deed or mortgage of the homestead "shall not be valid without the signature of the wife,"

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band and wife, it was, notwithstanding, held that a deed by the husband alone is valid, subject to the homestead right to the value of $500, when such right is demanded by the husband and wife, or wife, or minor children. *Atkinson* vs. *Atkinson*, 37 N. H. 434; *Horn* vs. *Tufts*, 39 Id. 478; *Gunnison* vs. *Twitchell*, 38 Id. 62. See also *Davis* vs. *Andrews*, 30 Verm. 678, where a similar view is taken, and wife's-right is likened to that of dower. *Howe* vs. *Adams*, 28 Id. 541; *Sargent* vs. *Wilson*, 5 Cal. 504; and statutes of these states, *supra.* But see *Richards* vs. *Chase*, 2 Gray 383; *Williams* vs. *Starr*, 5 Wis. 534; *Yost* vs. *Devault*, 9 Iowa 60; *Alley* vs. *Bay*, Id. 509; *Jenny* vs. *Gray*, 5 Ohio St. R. 45.

[1] Compare with *Belin* vs. *Burns*, 17 Texas 532, where it seems to have been considered that a note given by the vendor to the vendee, in consideration of the cancellation of an executory contract to sell the homestead, signed by the husband alone, is invalid and without consideration.

[2] Suggestion as to damages, 9 Iowa 60, 63; 4 Iowa 1.

a mortgage by the husband alone is not valid even as to him. *Williams* vs. *Starr*, 5 Wis. 534; *Alley* vs. *Bay*, 9 Iowa 509. But the benefit of the homestead law will not of course attach to premises which become a homestead *after* the execution of a mortgage as against the mortgagee. *McCormick* vs. *Wilcox*, 25 Ill. 274; *Yost* vs. *Devault*, 3 Iowa 345; S. C., 9 Id. 60. It has been accordingly adjudged, in a very recent case, that a junior mortgage of a homestead, executed by both husband and wife, has priority over a senior mortgage executed by the husband alone. And a purchaser at a sale, under the foreclosure of such junior mortgage, obtains a title good against the prior mortgage, although in a suit to foreclose such prior mortgage the husband and wife are made parties and make no defence. *Alley* vs. *Bay*, *supra*. And such purchaser may maintain a bill to set aside the prior mortgage executed by the husband alone. This doctrine proceeds upon the principle that any other rule "would allow the husband alone the power to obstruct, in advance, the free exercise of the right of alienation belonging to the husband and wife." *Dorsey* vs *McFarland*, 7 Cal. 342; same principle, 8 Id. 75.

So, also, under an act providing that "no conveyance by a husband . . . . shall be valid unless the wife join," it was held, that a mortgage by the husband alone of the homestead was utterly void, though of far greater value than that allowed by statute.[1] *Richards* vs. *Chase*, 2 Gray 383.

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[1] In other states a different view seems to be taken. Thus, in California, under a statute which declares "that no sale or alienation of the homestead shall be valid without the signature of the wife to the same, acknowledged, &c., and that the homestead shall not exceed $5000 in value," it is holden that a mortgage executed by the husband alone is valid as to the excess and void only as to the homestead value. *Sargent* vs. *Wilson*, 5 Cal. 504. Of a similar opinion under their statutes are other courts. See *Atkinson* vs. *Atkinson*, 37 N. H. 434; *Horn* vs. *Tufts*, 39 Id. 478; *Gunnison* vs. *Twitchell*, 38 Id. 62; *Davis* vs. *Andrews*, 30 Verm. 678; *Howe* vs. *Adams*, 28 Id. 541; *Stewart* vs. *Mackey*, 16 Texas 56, 57.

In Texas the constitution provides "that the homestead shall not be subject to *forced sale* for debts hereafter contracted." "Nor shall the owner, if a married man, alienate the same, unless by the consent of his wife, in such manner as the legislature shall point out." Under these provisions it was held, 1st. That an ordinary mortgage, properly executed both by husband and wife, could not be fore-

It is a logical result of this view that a mortgage upon a homestead, which is *void*, because executed by the husband alone, is not rendered valid by the subsequent death of the wife without children. In such case the *debt* remains good, and if the homestead character of the property is gone, and it becomes, under the statute, liable to creditors, the mortgagee of the husband and the other creditors stand upon the same footing, their rights not being at all varied by reason of the execution of such a mortgage.[1] *Revalk* vs. *Kraemer*, 8 Cal. 66, 76. But if a prior valid mortgage exists upon the premises at the time they become a homestead, and afterwards a new mortgage is executed by the husband alone to a person who pays off the first mortgage and causes it to be released, the release of the old and the execution of the new mortgage being on the same day, such new mortgage, being in equity treated as an assignment of the first mortgage, is valid, though the wife did not join therein. *Swift* vs. *Kramer*, 13 Cal. 526.

Before leaving the subject of mortgages upon the homestead, a word may be added as to the mode of foreclosure. The wife is a necessary party to a bill to foreclose. It is error to refuse to

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closed in court or the property sold on judicial process, because such a sale would be a "forced sale." *Sed qu.* 2d. That the power to alienate included the power to mortgage, and therefore a mortgage containing a power of sale, on default of payment, would be valid, and could legally be exercised. *Sampson* vs. *Williamson*, 6 Texas 102; 16 Id. 58. In Minnesota, under the peculiar language of the statute, it was held by a majority of the Supreme Court, (but in our opinion with doubtful correctness,) that the husband alone could execute a valid mortgage upon the homestead. *Olson* vs. *Nelson*, 3 Minn. 53. But the contrary is now the law by express statute. Laws of 1858, p. 9, § 2.

The Illinois statute protects the homestead "from levy and *forced* sale under judicial process." *Held*, that a sale made by a trustee under a deed of trust, was not within the law, and was therefore valid. *Ely* vs. *Eastwood*, 26 Ill. 107; *Id. Smith* vs. *Marc*, 150. See, also, as to deeds of trust on homestead. *Stevens* vs. *Meyer*, 11 Iowa 183.

[1] A different, and perhaps less satisfactory conclusion, appears to have been arrived at in another state, where it is considered that a mortgage on the homestead, not effectual when it is made, may yet become valid and attach as a *lien* by the subsequent abandonment of the homestead and the acquisition of a new one *Stewart* vs *Mackey*, 16 Texas 56.

allow her to intervene and claim the premises as a homestead *Sargent* vs. *Wilson*, 5 Cal. 504. If she is not made a party her rights are not affected. *Revalk* vs. *Kraemer*, 8 Cal. 66; *Tadlock* vs. *Eccles*, 20 Texas 782. If the husband, being made a party, sets up a right of homestead, the court, before decree, should order the wife to be brought in as a party. *Marks* vs. *Marsh*, 9 Cal. 90. If the husband alone is made a party and defends, his rights are not concluded by the decree, and he may, notwithstanding, join with his wife in a bill to restrain the carrying of the decree into effect. *Revalk* vs. *Kraemer*, 8 Cal. 66, 74, 75; *Cook* vs. *Klink*, Id. 347. But where both the husband and wife are parties and in court, a decree determining the property to be liable is as binding as in other cases, and cannot be assailed except for fraud. The question, in such cases, being by the decree *res judicata*, the homestead right cannot again be set up and litigated when an action is brought to recover possession. But it may be, if the wife was not a party to the decree of foreclosure. Where the parents have the right to dispose of the homestead, without consulting the children, whatever decree binds the parents will equally bind the children.[1] *Lee* vs. *Kingsbury*, 13 Texas 68; *Tadlock* vs. *Eccles*, 20 Id. 782; *Brewer* vs. *Wall*, 23 Id. 589; *Beecher* vs. *Baldy*, 7 Mich. 488.

Exempted property is not rendered subject to levy and sale by general creditors in consequence of being mortgaged. *Collett* vs. *Jones*, 2 Ben. Mon. 19; *Vaughan* vs. *Thompson*, 17 Ill. 78.

THIRD: *As to the Abandonment of Homestead.*—We have heretofore seen that, in general, actual residence and occupation of the premises as a home by the family, are essential legal attributes of a homestead. It results from the nature of a homestead, that a man or the head of a family can have but one homestead at the same time. In this respect the homestead right is unlike the

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[1] Generally it may be said that in actions to determine or affect homestead rights, the wife should be a party. See cases above, and also *Wisner* vs. *Farnham*, 2 Mich. 472. The contrary view is alone taken in Iowa. *Sloan* vs. *Coolbaugh*, 10 Iowa 31. In one state it is held, on the ground that the homestead is the joint estate of the husband and wife, that both must join in ejectment. *Poole* vs. *Gerrard*, 6 Cal. 71; *Taylor* vs. *Hargous*, 4 Ib. 273.

dower right, which attaches to every parcel of which the husband is seised during the marriage. *Horn* vs. *Tufts*, 39 N. H. 478, 483; *Howe* vs. *Adams*, 28 Verm. (2 Williams) 544.

With respect to the abandonment of one home and the acquisition of another, the courts have frequently drawn analogies from the rules in relation to domicil and the change of domicil. It is not to be denied that such analogies are, in many cases, applicable. But, on the assumption that an old homestead may be abandoned before a new one is acquired, the rules in relation to domicil are not entirely pertinent. For the law as to domicil is that every man must have a domicil somewhere, and the original domicil is not gone until a new one is actually acquired, *facto et animo*. Story on Conft. Laws, § 47; *Shepherd* vs. *Cassidy*, 20 Texas 29; *Walters* vs. *The People*, 18 Ill. 199; S. C., 21 Ill. 178; *Abbington* vs. *North Bridgwater*, 23 Pick. 177.

The assent of the wife is not necessary to enable the husband to *select* and *fix* the homestead. And it has also been decided that the husband alone can *change the homestead* without her assent.[1] *Williams* vs. *Sweatland*, 10 Iowa 51.

It is agreed that upon the acquisition of a new homestead though of less value, the homestead right in the former is thereby terminated. *Horn* vs. *Tufts*, 39 N. H. 478, 483; *Trawick* vs.

[1] There is no objection to investing the husband with the right to exchange one homestead for another. But where, by statute, a sale or conveyance of the homestead without the signature of the wife is of no validity, it would not accord with the nature and design of the homestead policy, to hold that the husband has the right to require the wife to leave the homestead before a new one is acquired. If she leaves, not assenting to the removal, her homestead rights should not be forfeited in consequence. See, on this point, *Taylor* vs. *Hargous*, 4 Cal. 268; 7 Id. 345; 10 Id. 167, 296; 16 Texas 58, where it is said, that "the wife may refuse to abandon her homestead, or acquiesce in its sale, or other disposition, without provision for another homestead." No good objection is perceived (in the absence of statutory regulation) to holding, on general principles, that the husband may *change the homestead*, by which is meant that, when a new home has actually been obtained, it is the right of the husband, as the head of the family, to require the wife to remove to the new home. As there cannot be two different homesteads at the same time, under the circumstances last supposed, it is probable that the former homestead would lose its character as such, even though the wife might remain in its actual possession.

Harris, 8 Texas 312; *Taylor* vs. *Boulware*, 17 Id. 74; 16 Id. 58; *Howe* vs. *Adams*, 28 Verm. (2 Williams) 544; *Taylor* vs. *Hargous*, 4 Cal. 268. Not only so, but the better opinion would seem to be that a homestead right may be waived or forfeited by *clear and decisive proof of an intention totally to relinquish and abandon it, accompanied by removal from it, even though a new homestead should not be gained.* Any other rule would too much embarrass the condition and rights of property, and open the way to fraud. But it must clearly, and beyond all reasonable ground of dispute, appear that the abandonment was with an intention not to return and claim the exemption. A doubtful or mixed case will not avail to cut off the right. If there be an intention to abandon, such intention may be changed and possession resumed before intervening rights have attached. *Shepherd* vs. *Cassidy*, 20 Texas 24; *Gouhenant* vs. *Cockrell*, Id. 96; *Davis* vs. *Andrews*, 30 Verm. 678.

If the homestead right has once attached it is not indispensable that there should be continuous actual occupation in order to preserve it. The following observations of HEMPHILL, C. J., 18 Texas 417, are well supported by the decisions: "If the citizen or family," says he, "should leave in search of another home, the first would remain until the second should be acquired. If the husband should remove his wife and family into another county and, without providing them a home, should abandon his wife, she might again resume possession of the homestead. And no absence on pleasure or business, and not designed as an abandonment, would work a forfeiture of the right." S. P. *Shepherd* vs. *Cassidy*, *ut sup.*; *Taylor* vs. *Boulware*, 17 Id. 74; *Walters* vs. *The People*, 18 Ill. 194; S. C. 21 Ill. 178.

Voluntary removal, by a married woman, from the state and domiciliation in another, deprives *her* of the homestead privilege. *Trawick* vs. *Harris*, 8 Texas 312. But not the children. *Walters* vs. *The People*, 21 Ill. 178.

So, where the husband, without being joined by his wife, sold the homestead, and removed with his family, including his wife, to another state, where the husband died, the widow has no right of

homestead. *Jordan* vs. *Godman*, 19 Texas 273. So, upon the same principle, a wife who, *without good cause*, voluntarily abandoned her husband for several years (three or four) prior to his decease, and refused to return, forfeited thereby her claim both to the homestead right and the widow's allowance. *Earle* vs. *Earle*, 9 Texas 630. But a removal by the family to another place within the same state, for a temporary purpose, will not amount to an abandonment of the homestead. *Moss* vs. *Warner*, 10 Cal. 296. In *Taylor* vs. *Hargous*, 4 Cal. 268, on the principle that the wife has an interest in the estate, and that the homestead right can only be conveyed or extinguished by the joint deed of both husband and wife in the manner provided by law, it was held that removal by the husband and wife after a sale in which the wife did not join, was neither an abandonment of the right of homestead, nor evidence of such abandonment. See also 7 Cal. 345; *Dunn* vs. *Tozer*, 10 Id. 167; *Dearing* vs. *Thomas*, 25 Geo. 223.

Evidence of a desire to *sell* is not proof of a design to *abandon* the homestead. Thus, where both husband and wife have endeavored to sell the homestead and, failing to do so, removed from it, it was adjudged not to be liable to sale on execution.[1] *Dunn* vs. *Tozer*, *supra*. And abandonment of the homestead will not be inferred from the fact that the head of the family is in search of another home. *Kitchell* vs. *Burgwin*, 21 Ill. 40.

IV. WHETHER A JUDGMENT IS A LIEN UPON THE HOMESTEAD.—A question of some considerable importance has several times

[1] It may be remarked that the homestead right is more liberally supported in California than in perhaps any other state. On the principle that the homestead exemption is intended as much for the *children* as for the wife, it is held that abandonment by and adultery of the wife do not defeat the right of homestead or divest the homestead of its character as such. Hence, a mortgage executed subsequent to the wife's elopement, by the husband alone, is inoperative and void. *Lies* vs. *De Diablar*, 12 Cal. 327; *Walters* vs. *The People*, 21 Ill. 178. But in Vermont a lease of the home-farm for five years, accompanied with removal of owner, (there being no evidence of an "intention to return to the premises to live, before the expiration of the term, if ever,") were held to forfeit the homestead right in favor of the grantee of the husband alone. *Davis* vs. *Andrews*, 30 Verm. 678; *Hoitt* vs. *Webb*, 39 N. H. 158, 483. But it is otherwise where the lease is short and there is an intention to resume possession. *Hancock* vs. *Morgan*, 17 Texas 582.

arisen as to the effect on the homestead property of the general statutes, making judgments against a debtor *liens* upon his *real estate.* The decisions relating to this subject have been made wholly without reference to each other, and are not harmonious. In Wisconsin a general statute provided that "all judgments in courts of record should be liens on the real estate of every judgment debtor." The homestead act declared that "the homestead should not be subject to forced sale on execution," &c. The act was silent in relation to lien of judgments; contained no provision as to *change* of homestead, and rendered any alienation without the consent of the wife, invalid. Under these circumstances, the majority of the Supreme Court (SMITH, J., *dissenting*) held that a judgment was a lien, and that whenever the homestead ceases to be occupied as such by the debtor's voluntary act, or is aliened by him, the lien of the judgment, which was before suspended, may be enforced by sale on execution. *Hoyt* vs. *Hine*, 3 Wis. 752. The same conclusion was reached in New York, in *Allen* vs. *Cook*, 26 Barb. 374. A similar view was taken in Michigan, in which state the Supreme Court seems to have been of opinion that the homestead character of the property would not run with or follow the land, so as to protect it in favor of a mortgagee from a prior judgment as to which, in favor of the mortgagors, it would be exempt. *Chamberlain* vs. *Lyell*, 3 Mich. (Gibbs) 448. And see *Herschfeldt* vs. *George*, 6 Id. 456, 469; *Lawton* vs. *Bruce*, 39 Maine 488.[1]

It is submitted with deference that these views are not tenable.

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[1] In Minnesota the statute declared a judgment to be a lien on "*all* the real property of the judgment debtor in the county," &c. Another provision of the statute exempted the homestead owned and occupied by the debtor as a residence, from *sale* on execution. The homestead statute was silent on the subject of the lien of judgments, and contained no provision for a *change* of homestead. It was held, that a judgment was a lien; that the homestead was exempt from sale only so long as it was occupied by the debtor or his family; and that, upon conveyance by the husband and wife, it ceased to remain exempt, in the hands of the grantee, from sale under a prior judgment against the grantor. *Folsom* vs. *Carli*, 5 Minn. 333. But by the Act of March 10, 1860, it is expressly provided that a judgment debtor may remove from or sell the homestead without subjecting it thereby to sale on execution.

The homestead being *exempt*, and placed beyond the reach of involuntary judicial sale, it is difficult to see, if the statute is silent on the subject, on what principle a judgment can be said to be a *lien* upon it. Such a construction of the homestead acts is justly open to the criticism of making the "homestead of the debtor his prison." It obstructs or defeats the free exercise of the right of alienation belonging to both husband and wife. That a judgment is *not a lien*, unless the statute expressly so declares, has been determined in Illinois, in a very recent and well considered case. *Green* vs. *Marks*, 25 Ill. 221. It was accordingly held, under a statute substantially the same as the statutes of New York and Wisconsin, that the owner of a homestead might sell or mortgage it, and the grantee or mortgagee took it free from the lien of a judgment against the grantor. The principle upon which *Dorsey* vs. *McFarland*, 7 Cal. 342; 8 Id. 75; *Alley* vs. *Bay*, 9 Iowa 509; *Yost* vs. *De Vault*, Id. 60, were decided, sustains the correctness of the decision of the Supreme Court of Illinois just cited. Indeed, in Wisconsin, the legislature, after the decision of *Hoyt* vs. *Hine*, *supra*, interposed by enacting (May 17, 1858) that no judgment in either the Federal or state court should be a lien on the homestead. See also Act of Iowa Legislature, Session 1861–62. The question as to whether a judgment is a lien, the statute being silent, is before the Supreme Court of Iowa, and not yet decided. The decision will doubtless appear in 13th Iowa Reports.

Homestead Right subordinate to Vendor's Lien.—Many of the statutes contain an express provision that the homestead exemption shall not exist as against the claim of the vendor for the purchase-money. But even where there is no such statute the lien or claim of the vendor for the unpaid purchase-money would be preferred to the debtor's right of homestead. *Farmer* vs. *Simpson*, 6 Texas 303; *Barnes* vs. *Gay*, 7 Iowa 26; *Dillon* vs. *Byrne*, 5 Cal. 455; *Shepherd* vs. *White*, 11 Texas 354; *Montgomery* vs. *Tutt*, 11 Cal. 190; *Phelps* vs. *Conover*, 25 Ill. 309; *Stone* vs. *Darnell*, 20 Texas 14; *Succession of Foulkes*, 12 La. An. 537; 13 Cal. 75

And the vendor's right will be thus preferred even if the old

mortgage given for the purchase-money be cancelled, and a new mortgage on the same and other property, executed by the *husband alone*, be taken to secure the same and another debt. *Dillon* vs. *Byrne*, *supra*; *Barnes* vs. *Gay*, *supra*; *Swift* vs. *Kraemer*, 13 Cal. 526.

So, also, on the same principle, where the husband who was residing on the place as a tenant purchased the same, and to enable him to do so borrowed the whole purchase-money from *another* person, and without his wife joining executed a mortgage to secure the money thus borrowed simultaneously with his receiving a deed, the homestead right, notwithstanding the non-joinder of the wife, is subordinate to the mortgage. *Lassen* vs. *Vance*, 8 Cal. 271.

On a similar principle, where there is a resulting trust, and the trustee holds the legal title in trust for the real owner, the trustee cannot acquire upon the land a homestead discharged of the trust. *Shepherd* vs. *White*, 11 Texas 346. So a *mechanic's lien*, if the party is by law entitled to a lien, has priority over the homestead right of the owner. *Merchant* vs. *Perez*, 11 Texas 20. But the husband alone cannot as against the homestead right *enlarge* the demands of the vendor or mechanic by agreeing to pay him more interest than was due by the original contract. *McHenry* vs. *Reilly*, 13 Cal. 75; 5 Id. 455. And there may be a *waiver* by the vendor of his right which will leave the homestead right paramount. *Phelps* vs. *Conover*, 25 Ill. 309. But the taking of a new mortgage for the purchase-money does not amount to such waiver. *Dillon* vs. *Byrne*, 5 Cal. 455; *Barnes* vs. *Gay*, 7 Iowa 26.

A citation in a note of some cases referring to subjects not properly within the scope of the foregoing article, may prove acceptable to the reader.[1]

Davenport, Iowa. J. F. D.

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[1] Homestead acts are without effect as to prior creditors. *Milne* vs. *Smith*, 12 La. An. R. 553; 10 Id. 509; *Succession of Aaron*, 11 Id. 671; *Simonds* vs. *Powers*, 28 Verm. (2 Williams) 354; *Grayson* vs. *Taylor*, 14 Texas 672; *Lawton* vs. *Bruce*, 39 Maine 484. *Quære*, whether the legislature has the power to exempt the homestead

from liability for antecedent debts? *Charless* vs. *Lamberson*, 1 Iowa 442. It has not. 1 Denio 129; 3 Id. 594; 1 Comst. 129. See 3 Iowa 287.

When exempt, sale and deed by sheriff are void, and a bill lies to cancel. *Pinkerton* vs. *Tumlin*, 22 Geo. 165; *Beecher* vs. *Baldy*, 7 Mich. 488. When the sale is void the sheriff is not liable to homestead owner for damages. *Kendall* vs. *Clark*, 10 Cal. 17.

Mortgagee of homestead may release the same without affecting his right to participate in the proceeds of a general assignment for the benefit of creditors *pro rata*. *Dickson* vs. *Chorn*, 6 Iowa 19. The rule that where a creditor has two funds, he may be required to resort to that fund upon which another has no lien, does not apply to such a case. Id.

Marshalling of assets and securities as connected with homestead right. *Beals* vs. *Clark*, 13 Gray 18; 6 Iowa 19; *Wood* vs. *Wheeler*, 7 Texas 13; S. C. 11 Id. 122; *James* vs. *Thompson*, 14 Id. 463; 20 Id. 247.

Sale where value is limited, and appropriation of excess. *Dearing* vs. *Thomas*, 25 Geo. 223; *Gary* vs. *Eastabrook*, 6 Cal. 457; *Wood* vs. *Wheeler*, 7 Texas 13; S. C. 11 Id. 122; 15 Texas 174; *Fletcher* vs. *State Bank*, 37 N. H. 369. Value as of what date to be ascertained. *Herschfeldt* vs. *George*, 6 Mich. 456. Bill in equity will lie to determine *value*, if there is no statutory mode. 7 Mich. 488.

Proceeds, it seems, are not subject to garnishment for the husband's debts, if made payable to the wife, to induce her to sign a deed for the homestead. *Ogden* vs. *Giddings*, 15 Texas 485. See, as to garnishment of proceeds of exempt property, 27 Verm. (1 Williams) 561; 29 Id. 291, Opinion by REDFIELD, C. J.

Notice of homestead rights. Recorded notice not necessary, unless statute so requires—actual occupation sufficient notice. 4 Cal. 23, 26; 6 Id. 165; 7 Mich. 503, 505. Even when notice to officer is required, it may be verbal, and is sufficient if given after levy and *before* sale. 7 Mich. 488, 510; 29 Penn. St. R. 362; 3 Iowa 292.

Grantee, and those claiming under him, are bound to take notice of a recital in his grantor's deed in relation to the *residence* of the grantor upon the premises. 10 Iowa 51.

Head of family, who? *Wood* vs. *Wheeler*, 17 Texas 13, 20; 11 Iowa 104; Id. 227; 20 Mo. 75; 22 Id. 464; 3 Humph. 216; 17 Ala. 486; 4 Id. 554; 7 Id. 721; 31 Id. 192; 14 Barb. 456; 18 Johns. 400; 8 Cal. 66; 17 Texas 74.

Repeal of Exemption Act. "It is competent for the legislature to take away exemptions, or to require a record of the exemption when none was required before." DEWEY, J., 13 Gray 24. See also 11 Richards (Law) 353. But see 4 G. Greene (Iowa) 563, where a questionable reason is given for what, under the general statute of the state saving rights acquired under repealed statutes, is a sound decision. *Helfenstein* vs. *Gore*, 3 Iowa 287; 23 Texas 498; 14 Id. 672.

Effect of extension of city limits so as to embrace a *country* homestead. *Taylor* vs. *Boulware*, 17 Texas 74; *Finley* vs. *Dietrich et al.*, 12 Iowa 516.